

1 Larry A. Hammond, 004049
2 Anne M. Chapman, 025965
3 OSBORN MALEDON, P.A.
4 2929 N. Central Avenue, 21st Floor
5 Phoenix, Arizona 85012-2793
6 (602) 640-9000
7 lhammond@omlaw.com
8 achapman@omlaw.com

9 John M. Sears, 005617
10 P.O. Box 4080
11 Prescott, Arizona 86302
12 (928) 778-5208
13 John.Sears@azbar.org

14 Attorneys for Defendant

15 IN THE SUPERIOR COURT OF THE STATE OF ARIZONA
16 IN AND FOR THE COUNTY OF YAVAPAI

17 STATE OF ARIZONA,)	No. P1300CR20081339
)	
18 Plaintiff,)	Div. 6
)	
19 vs.)	DEFENDANT'S MEMORANDUM
)	ON ARIZONA RULE OF
20 STEVEN CARROLL DEMOCKER,)	CRIMINAL PROCEDURE 19.5
)	
21 Defendant.)	
)	
)	
)	UNDER SEAL

22 Steven DeMocker, by and through counsel, hereby files a preliminary position on
23 whether or not resumption of the trial will result in prejudice to the defense. This
24 position is based on the due process clause, the Sixth Amendment, the Eighth
25 Amendment and Arizona counterparts, Arizona Rules of Evidence, Rules of

SUPERIOR COURT
YAVAPAI COUNTY, ARIZONA

2010 JUL 15 PM 4:41

JEANNE HICKS, CLERK

BY: J. Ries

RECEIVED

JUL 15 2010

DIVISION 6

1 Professional Conduct, Arizona Rules of Criminal Procedure and the following
2 Memorandum of Points and Authorities.

3 **MEMORANDUM OF POINTS AND AUTHORITIES**

4 Mr. DeMocker was indicted in October of 2008. The parties engaged in
5 extensive pretrial litigation which resulted in a series of pretrial rulings, preclusion and
6 sanctions against the State. Trial commenced with jury selection on May 4, 2010.
7 Judge Lindberg fell ill suddenly on June 17, 2010. Judge Darrow was appointed to
8 make a Rule 19.5 determination on July 2, 2010. A hearing is set on July 16 to address
9 this issue and the Court has suggested that trial might resume on Tuesday, July 20.

10 The determination under 19.5 is for the Court to make. The Rule does not call
11 for counsel's recommendations, although the Court has requested that any position from
12 either side be provided to the Court. Defense counsel appreciate the daunting task
13 undertaken by the Court of getting up to speed on a case that has been pending for
14 nearly two years with a trial that began on May 4. Counsel also understand that the
15 determination required under Rule 19.5 of whether or not the resumption of trial would
16 be prejudicial to either the State or the defendant is a difficult one to make.

17
18 **I. The Length of the Delay in Resuming Trial Was Intentionally Caused by the**
19 **State**

20
21 Since Judge Lindberg's illness on June 17, the State has done everything in its
22 power to delay the resumption of this trial with this jury and create a mistrial. First, the
23 State rejected thirteen of eighteen proposed judges and proposed no judges themselves
24 to resume the trial. Without doubt, the lack of active cooperation contributed to the
25 delay. Second, the State, even though it was aware of the facts as stated in John Sears'
26 opening on June 3, waited until July 1 to inform the Court and parties, in violation of
27 Rule 15.6, that it had additional disclosure. Third, the State disclosed over 1100 pages

1 of late disclosure, the discovery of which was only delayed by the State's lack of due
2 diligence, the materials now produced have been available to the State since 2008.
3 Fourth, the State late disclosed, on July 9, that it intended to call John Sears as a witness
4 as to the Hartford Insurance issues. Fifth, the State improperly inquired as to the
5 substance of *ex parte* under seal orders of the Court and appears to have obtained
6 significant otherwise sealed information. Sixth, the State, after 7 days of presenting its
7 case-in-chief, announced for the first time that it would need 25 days to complete its
8 case-in-chief, creating a trial two months longer than proposed during voir dire and
9 through and including the first 8 days of trial. Then, on July 12, the State filed a Motion
10 to Determine Counsel, ignoring the Court's order to file its position on the Hartford
11 Insurance issues, and made wild, unsupported and defamatory accusations against
12 counsel. This pattern of misconduct can only be seen as a series of attempts to interfere
13 with Mr. DeMocker's right to counsel of his choice and to create a mistrial. This delay
14 could have been limited to a matter of a week or two with the full cooperation of the
15 State. Instead, the delay is now more than a month. This is the direct result of the
16 State's misconduct.

17 **II. The Defense Position on Whether or Not the Resumption of Trial Would be** 18 **Prejudicial Will Be Informed by Resolution of Pending Issues**

19
20 The defense position with respect to whether or not the resumption of trial would be
21 prejudicial to Mr. DeMocker will be informed largely by a few outstanding issues.

22 *1. Motions to Reconsider*

23 The question of whether or not the Court reconsiders Judge Lindberg's evidentiary
24 rulings and makes contrary evidentiary decisions will have a substantial effect on the
25 defense thinking about prejudice of this month long delay. Although the State has yet to
26 file a single motion to reconsider, it has several times mentioned since June 17 that it
27 intends to do so. Arizona Rule of Criminal Procedure 16.1(d) provides as follows:

1
2 Finality of Pretrial Determination. Except for good cause, or as otherwise
3 provided by these rules, an issue previously determined by the court shall
4 not be reconsidered.

5 The comment to Rule 16.1(d) further explains: “issues, once determined by a court
6 ought not, without a showing of good cause, be reconsidered by the same court or
7 another of equal jurisdiction.”

8 Counsel and the Court spent a great deal of time and energy identifying and
9 litigating important pretrial evidentiary concerns over a year and a half. The Court
10 issued detailed Minute Entries with respect to many evidentiary issues. The defense has
11 provided the Court with an outline of evidentiary rulings and copies of relevant
12 transcripts and Minute Entries. The defense has made strategic decisions with respect to
13 opening statements, cross examination, and the identification of witnesses and exhibits
14 based on these pretrial decisions of the Court. If those decisions are going to be
15 reconsidered and evidentiary rulings are going to be different mid-trial, prejudice will
16 result. This is precisely the reason that evidentiary motions are contemplated by Rule
17 16.1 to be filed not later than 20 days prior to trial and that pretrial determinations are to
18 be treated as final “except for good cause.”

19 Because of the inherent prejudice of changing evidentiary decisions mid-trial and the
20 State’s repeated suggestions that they intend to ask the Court to reconsider a variety of
21 evidentiary rulings, counsel suggest that this issue must be addressed before the defense
22 can provide its position on the prejudice of resuming trial. Therefore, counsel request
23 that the Court order the State to identify all evidentiary rulings it intends to seek
24 reconsideration of by 5:00 on Friday, July 16. Counsel also request that the State file
25 any motions and briefing in support of any such motions to reconsider prior evidentiary
26 rulings by 9:00 Monday, July 19. Counsel further request that the Court hold a hearing
27 on Monday at 3:00 p.m. for the defense to be heard on the possibility of motions for
28

1 reconsideration and resulting prejudice. This process will assist in the defense
2 determination of whether or not the delay occasioned by Judge Lindberg's illness and
3 the State's misconduct is prejudicial and whether the trial should now proceed.

4
5 *2. Hartford Insurance Issues*

6 As mentioned elsewhere in pleadings filed with the Court, the very serious and
7 entirely unwarranted attacks on the defense team by the prosecution during this break
8 have certainly prejudiced Mr. DeMocker.

9 The continued prejudice and defense position regarding Rule 19.5 will also be very
10 much informed by the Court's decision concerning the admissibility of the late
11 disclosed Hartford Insurance proceeds evidence. If the State is told firmly that their
12 proposed evidence related to the disposition of the life insurance proceeds will not be
13 admitted, the defense believes it is much more likely that the trial can proceed without
14 continued prejudice to Mr. DeMocker.

15 **III. The Hobson's Choice**

16 Mr. DeMocker has been incarcerated since October of 2008. He has always and
17 continues to maintain his innocence. He very much wants to proceed with trial as soon
18 as possible so that he can be acquitted and return to his family. He and his family,
19 particularly his daughters who are the most direct victims of the murder of Carol
20 Kennedy, have been denied their right to grieve and comfort one another in their great
21 loss. Although Mr. DeMocker has obviously been prejudiced by the State's conduct in
22 lengthening this delay, providing late disclosure and accusing his counsel of
23 misconduct, the failure to resume this trial and requiring the trial to resume with a
24 different jury at a later time would result in even greater prejudice and delay to Mr.
25 DeMocker's eventual exoneration and release. Mr. DeMocker should never have had to
26 consider making this choice.

1 The defense believes that answers to these pending questions identified above would
2 assist in their determination of the prejudice to Mr. DeMocker in continuing with this
3 trial with this jury. Counsel request an opportunity to be heard on this issue after these
4 questions are resolved.

5
6 DATED this 15th day of July, 2010.

7
8 By: 

9 John M. Sears
10 P.O. Box 4080
11 Prescott, Arizona 86302

12 OSBORN MALEDON, P.A.
13 Larry A. Hammond
14 Anne M. Chapman
15 2929 N. Central Avenue, Suite 2100
16 Phoenix, Arizona 85012-2793

17 Attorneys for Defendant

18 **ORIGINAL** of the foregoing hand delivered for
19 filing this 15th day of July, 2010, with:

20 Jeanne Hicks
21 Clerk of the Court
22 Yavapai County Superior Court
23 120 S. Cortez
24 Prescott, AZ 86303

25 **COPIES** of the foregoing hand delivered this
26 this 15th day of July, 2010, to:

27 The Hon. Warren R. Darrow
28 Judge Pro Tem B
120 S. Cortez
Prescott, AZ 86303

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

Joseph C. Butner, Esq.
Jeffrey Paupore, Esq.

Prescott Courthouse basket

3210176